IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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STATE OF WASHINGTON, et al., Appellants, v. CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION, Appellee.	ERRATA SHEET

Printing or typographical errors in the Brief of Appellants should be corrected as follows:

1. On page 17, line 24, change "now" to "not."

2. On page 32, line 29, in heading III change "no" to "not."

3. On page 42, line 27, after "p." insert "51-54."

4. On page 44, line 27, in the last line of the quote, after "p." insert "35-36."

5. On page 48, line 11, in the last line of the quote, after "p." insert "33-35."

6. On page 53, line 20, after "litigation" change "A" to "20."

7. On page 54, change footnote "A" to footnote "20."

8. On page 55, change footnote "B" to "21."

9. On page 55, change footnote "D" to "22."

10. On page 57, change footnote "C" to "23."

SLADE GORTON
Attorney General

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BRIEF OF APPELLANTS

OPINIONS BELOW

The decision appealed from, *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, is reported at 552 F.2d 1132 (9th Cir., 1977). It is reprinted in the jurisdictional state-

ment as Appendix A, pp. 31-36. The *en banc* opinion of that court on the question of the statutory authority of the State of Washington to assume "partial" jurisdiction over the Yakima Indian reservation, *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, is reported at 550 F.2d 443 (9th Cir., 1977) and is reprinted in the jurisdictional statement as Appendix C, pp. 38-59. The opinion of the United States District Court for the Eastern District of Washington upholding, in all respects, the validity of the State of Washington's assumption and exercise of jurisdiction over the Yakima Indian Nation is unreported and is reprinted in the Appendix at p. 13. The trial court's earlier opinion granting the State and Yakima County's motions for partial summary judgment is also unreported and is reprinted in the Appendix at p. 1.

JURISDICTION

This is an appeal pursuant to 28 USC § 1254(2) from a judgment of the United States Court of Appeals for the Ninth Circuit, holding a state statute, RCW 37.12.010, invalid as repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The judgment invalidating that act was entered on April 29, 1977. The Court of Appeals' order denying the Petition for Rehearing was entered on July 1, 1977, and is reprinted in the jurisdictional statement as Appendix B at p. 37. A notice of appeal to this court was filed

on July 27, 1977, and is reprinted in the jurisdictional statement as Appendix F at pp. 70 and 71. Because the Court of Appeals struck down a state statute on United States constitutional grounds, this court has jurisdiction on appeal pursuant to 28 USC § 1254(2). The court noted probable jurisdiction on February 27, 1978.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are the Equal Protection Clause, § 1 of Amendment 14 to the United States Constitution; Public Law 83-280, 67 Stat. 588, 22 USC 1162, 18 USC 1360; Public Law 90-284, 82 Stat. 78, 25 USC 1321, 1322, 1323 and RCW 37.12.010 (§ 1, chapter 36, Laws of 1963, amending chapter 240, Laws of 1957).

The Equal Protection Clause of the United States Constitution reads as follows:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provisions of Public Law 90-284 read as follows:

25 USC § 1321(a):

> "(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated

within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

25 USC § 1322(a):

"(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

25 USC § 1323(a)(b):

"(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title

28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

"(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal. Pub.L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79."

Public Law 280 and chapter 37.12 RCW are set forth in full in the Appendix at pp. 32-36 and pp. 37-40 respectively.

QUESTIONS PRESENTED

In 1953, by enacting Public Law 280, Congress transferred jurisdiction to five named states over Indians and Indian reservations located within their borders, with certain exceptions, and permitted all other states to assume such jurisdiction after affirmative legislative action. Responding to that act, the State of Washington in 1957 obligated and bound itself to assume civil and criminal jurisdiction over Indians and Indian reservations within the state at such time as a tribe or its governing body adopted a resolution petitioning this state for such an assumption. (Chapter 240, Laws of 1957). In 1963, recognizing that certain areas of fundamental and overriding concern to the State were not being adequately addressed within many of the Indian reservations within the State of Washington, and at the same time recognizing the unique status of Indian tribes and their legitimate interests in self-government, the state legislature amended chapter 240, Laws of

1957 by enacting chapter 36, Laws of 1963, codified as chapter 37.12 RCW. The 1963 enactment obligated the State to assume all jurisdiction over *all* non-Indian lands within reservations, but provided that such general jurisdiction would be exercised over Indians while on their tribal or trust lands only upon the request of the tribe involved.

The 1963 act further provided that *throughout* reservations the State would exercise jurisdiction as to compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles upon public streets, alleys, roads and highways (RCW 37.12.010). The 1963 act further provided that "full" jurisdiction would continue over the tribes that had petitioned for and thus became subject to complete state jurisdiction prior to 1963. The opportunity for Indian tribes to seek and obtain the "full" assumption of state jurisdiction by petition was retained.

The Court of Appeals struck down this statutory scheme on equal protection grounds, finding that the act failed to meet "any formulation of the rational basis test."

In noting probable jurisdiction the court directed the parties to address the following issue:

> "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

Within that issue appellants perceive the following sub-issues:

(1) Whether Congress, in enacting Public Law 280, authorized the State of Washington to exercise "partial geographic and subject matter jurisdiction" within the Yakima Indian reservation.

(2) Whether any rational basis exists for the State of Washington to have assumed jurisdiction within Indian reservations in a manner which recognizes both the fundamental interests of the State and the unique historical and cultural status of trust lands.

In addition, we anticipate appellee will address the following sub-issue, but for the reasons set forth, *infra*, at pages 27-32, we believe that issue is no longer properly present in the case:

(3) Whether Congress, in enacting Public Law 280, required the State of Washington to amend Article XXVI of its state constitution prior to assuming jurisdiction over the Yakima Tribe and its members.

STATEMENT OF THE CASE

A. The Statutory Scheme.

Public Law 280, enacted by Congress in 1953, provided for the immediate transfer of jurisdiction, with certain exceptions, from the United States to the states of California, Minnesota, Nebraska, Oregon and Wisconsin. That same act, in §§ 6 and 7, allowed other states to assume such jurisdiction, provided certain conditions were first met.

Responding to that act the State of Washington

in 1957 obligated and bound itself to assume civil and criminal jurisdiction over all Indians and Indian reservations located within its borders only when a tribe or its governing body adopted a resolution petitioning the State to assume such jurisdiction. (Chapter 240, Laws of 1957) In 1963 the state legislature amended that act by enacting chapter 36, Laws of 1963, now codified as chapter 37.12 RCW. That amendment provided for the assumption of all jurisdiction over Indians and all lands located within an Indian reservation which were not tribal or allotted lands and not held in trust or subject to a restriction against alienation, further, for jurisdiction over all Indians when on such tribal or trust lands only as to compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children and the operation of motor vehicles upon public streets, alleys, roads and highways. (RCW 37.12-.010);[1] The tribes were still left free to seek and obtain a complete assumption of state jurisdiction by petition. (RCW 37.12.021)

The state thus chose that most traditional and classic of all political decisions, a compromise, between its own fundamental interests and the recognized and legitimate interests of the tribes in their

[1]Of 23 such reservations within Washington, 11 originally petitioned for, and the state assumed, full jurisdiction. The Governor subsequently rescinded the proclamation as to the Quinault Reservation in recognition of an earlier mistake, and retroceded all but the jurisdiction exercised pursuant to RCW 37.12.010 as to the Port Madison Reservation. The validity of that action is one of the issues in a case currently pending before this court. See *Oliphant v. The Suquamish Tribe, et al.*, No. 76-5729, October Term, 1976.

own self government, based upon their own unique, historical and cultural status and their special relationship to "trust lands."

The Confederated Bands and Tribes of the Yakima Indian Nation has not adopted a resolution petitioning the Governor of the State of Washington to proclaim total state civil and criminal jurisdiction over its reservation and members.

The present action was commenced as a declaratory judgment action in the United States District Court for the Eastern District of Washington in May, 1971. The appellee tribe sought a declaration on behalf of itself and its members that the State of Washington's assumption and exercise of jurisdiction over its reservation and members was invalid on both constitutional and statutory grounds. The tribe claimed that chapter 37.12 RCW, the act under which the State of Washington assumed and has exercised jurisdiction over Indian reservations located within its borders violated the Fourteenth Amendment to the United States Constitution, Article XXVI of the Washington State Constitution, the Washington State Enabling Act (25 Stat. 676) and Public Law 280 (67 Stat. 588, 22 USC 1162, 18 USC 1360). The tribe also sought, in the alternative, a declaration that the jurisdiction assumed and exercised by the State was nonexclusive and concurrent with federal and tribal jurisdiction. After extensive discovery and the entry of a lengthy and detailed agreed pre-trial order, the trial court granted Defendant State and Yakima County's motions for

partial summary judgment on seven issues of law. In granting that motion the trial court held that it was unnecessary for the State of Washington to amend Article XXVI of its constitution prior to assuming jurisdiction over Indian reservations; that the State could assume less than full jurisdiction under the provisions of Public Law 280; that state jurisdiction was exclusive rather than concurrent; that the tribe's consent to the assumption of state jurisdiction was unnecessary; that the tribe lacked standing to raise the question of the vagueness of RCW 37.12.010; that regardless of the issue of standing, RCW 37.12.010 met the required standards of definiteness; and that the provisions of chapter 37.12 RCW met the constitutional standards of due process and equal protection. The question of the constitutional validity of state jurisdiction over the Yakima reservation as applied was reserved for a factual determination. After a one week trial the court held that the State's assumption and exercise of jurisdiction over the tribe and its members was valid in all respects under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and dismissed the Complaint. In so holding the trial court said:

> "It was not proved at trial that the state or county have discriminated against the plaintiff to deprive any Indian or the plaintiff Tribe of any service or protection, resource or asset afforded under the same state law to other citizens or similar geographic location. Nor was

> there any evidence of any conspiracy to discriminate. * * * [App. p. 19]
>
> "* * *
>
> "The evidence does not support the charge that plaintiff's racial class has suffered from disparity of governmental services offered to other Yakima County and City residents. Nor does the evidence show that other residents of the State of Washington have different treatment than plaintiff's members, or that the system of financing and allocating government services and resources in the State works to the peculiar disadvantage of plaintiff or its members. [App. p. 20]
>
> "* * *
>
> There is little evidence that governmental service provided non-Indian residents of the county was not provided Indian residents in like quality and quantity. Plaintiff has failed to make out a case of violation of the right to equal protection by the State or County or their officers. It has not been shown that the State and County system of financing and providing general governmental services lacks a rational purpose or that it does not comply with the due process requirements of the Fourteenth Amendment." [App. p. 21]

On appeal, a panel of the United States Court of Appeals for the Ninth Circuit heard argument in the spring of 1975. Subsequently, in March of 1976 the panel assignment was withdrawn and the court, *sua sponte*, ordered the case to be heard *en banc*, with consideration by the *en banc* court limited to the question of whether or not to overrule the opinion of the court in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir., 1966), in part, beginning at 368 F.2d 655 (Quinault II), in which the court held that Con-

gress, in enacting Public Law 280, had authorized Washington's partial assumption of jurisdiction over Indian reservations. The majority of the *en banc* court in that case adhered to the prior opinion in *Quinault II*, and held squarely that Washington's assumption of less than full jurisdiction was authorized by Congress. The court then remanded the case to the original panel before which it was initially heard to consider the constitutional issues involved. *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, 550 F.2d 443 (9th Cir., 1977) (Juris. St. Ap. C)

On remand the panel unanimously held that Washington's so-called "checkerboarding," that is the jurisdictional distinction between trust and non-trust lands within the exterior boundaries of Indian reservations, failed to meet "any formulation of the rational basis test" and thus violated the Equal Protection Clause of the Fourteenth Amendment. The panel also held that under Washington law the statute was nonseverable and struck down all of RCW 37.12.010. *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, 552 F.2d 1132 (9th Cir., 1977) (Juris. St. Ap. A)

B. **Applicable Facts.**

Plaintiff appellee is an Indian tribe or nation established by treaty with the United States (Treaty with the Yakimas, 12 Stat. 951). At the time of trial the tribe had a membership approaching 6,000, approximately one-half of whom resided within the ex-

terior boundaries of the Yakima Indian reservation. That reservation is located within the exterior boundaries of the State of Washington and principally within the exterior boundaries of Yakima County. The reservation has 1,387,505 acres, of which all but approximately 270,895 acres are held in trust or restricted status by the United States. (Pretrial Order, Record, p. 486) The vast majority of the non-trust land is concentrated in the northeastern portion of the reservation along the Yakima River and the agricultural areas to the west of the Cities of Toppenish and Wapato. (Ex. 34, Tr. p. 20) The reservation at the time of trial had a resident population of approximately 25,000, of which only approximately 3,000 were members of the Yakima Indian Nation. (Pretrial Order, Record, p. 486)

Several large, virtually non-Indian communities are located within the exterior boundaries of the reservation. The principal such communities are the Cities of Wapato and Toppenish. The land located within those cities, as well as other non-Indian communities located within the reservation, is almost entirely owned in fee and occupated by non-Indians. (Ex. 34, Tr. p. 20); (Pretrial Order, Record, p. 486)

The party stipulated, prior to trial, that insofar as the nature and quality of law enforcement services were concerned, all of the residents of Yakima County, including the members of the plaintiff tribe residing within their reservation, fare no worse than the residents of most of the counties of the State of Washington, and better than many. (Stip., Record,

pp. 722-729) The trial court, in its findings following trial, clearly found that to be the case. (Trial Court Opinion, Appendix pp. 19-21) The record is replete with substantial evidence in support of that finding, to the effect that the members of the Yakima Indian Nation, whether residing within or without the borders of their reservation, are not discriminated against and receive substantially the same law enforcement and other services from the state and county as do all other citizens.

Officer Del Young, at the time of trial a Yakima County deputy sheriff with 23 years experience patrolling the Yakima Indian reservation, testified in substance that no discrimination exists in the application of law enforcement services on the reservation. For example, Officer Young testified that the so-called "checkerboard" system of jurisdiction under state law is no hinderance to effective law enforcement on the reservation, at least for someone with some experience in that area. (Tr. pp. 220 and 221) Officer Young further testified that the relationship between the Yakima County sheriff's office and the Yakima Indian tribal police force is good and has been good over the years. (Tr. p. 226) With regard to the question of whether or not preferential treatment would be given to a non-Indian victim of crime within the Yakima Indian reservation over an Indian victim of a crime, Officer Young testified as follows:

> "Q. If you are in a position where a crime is reported to you, and you have the duty to respond in some way, and you would receive two such calls at the same time, approximately, and you haven't gone to either one of them yet, you have just received them, and one originates with a non-indian victim, and one with an indian victim, and the crimes are about equal in severity, would you favor one or the other on the basis of racial identity of the victim?
>
> "A. No, I would not." (Tr. p. 228)

Officer Young had earlier testified, under direct examination from the tribe's counsel, that the so-called "checkerboarding" did not hamper effective law enforcement since in most cases the officer knew whether it was Indian or non-Indian land, and, if doubt existed, it was easy to find out from the agency. (Tr. p. 220-221)

Officer Burdette Kent is a Yakima County deputy sheriff, and an enrolled member of the Yakima Indian Nation. (Tr. p. 231) Officer Kent resides on, and is responsible to patrol the Yakima Indian Reservation during the evening hours. (Tr. p. 233) Officer Kent also testified that the so-called "checkerboarding" system of jurisdiction provides no difficulty in enforcing the law. He said, for example:

> "Well, when we answer a call, we go to the scene. At our level there doesn't seem to be any difficulty." (Tr. p. 233)

Yakima County Sheriff John H. Thompson testified that while it was true that more men were assigned to the Upper Valley (basically, the urban area around the City of Yakima) rather than in the Lower Valley (including the Yakima Indian reservation)

this was because of the higher density of population, and the requirement for more law enforcement officers to handle the higher workload resulting from the higher incidence of serious crime. (Tr. p. 515) While it is true that slightly less than one-third of the uniformed officers of the Yakima County sheriff's office, at the time of trial, were assigned to patrol in the Lower Valley, including the Yakima Indian reservation, that one-third equalled no less than one-half of the work experience of the entire uniformed division of the sheriff's office. (Ex. 216, Tr. pp. 143, 144)

Cross-deputization exists between the Yakima County sheriff's office and the Yakima Indian tribal police. (Tr. p. 141, 222, 342, 343, 519, 520) Both the chairman of the Yakima Tribe's Law and Order Committee and the captain of the tribal police testified that the relationship between the tribe and the sheriff's force through the years was good, and that there existed a spirit of mutual respect between the Indian police and the sheriff's force. (Tr. pp. 348, 451-453)

Over one-half of the land within the Yakima Indian reservation is closed to non-tribal members. (Ex. 34, Tr. p. 20, 344, 346-347) The vast majority of the land within that area is in trust status. (Ex. 34) During the summer months at least one-half of the members of the Yakima Indian Nation reside within the closed area. (Tr. p. 443) Even though the Yakima Indian Nation is now complaining about an alleged inability on the part of the State to provide law enforcement services on trust lands because of

the jurisdictional system established by RCW 37.12-.010, a non-Indian deputy sheriff in order to make an arrest or answer a call in an area encompassing more than one-half of the Yakima Indian reservation would have to seek the special permission of the tribe before entering the closed area. (Tr. pp. 344, 346-347, 444)

SUMMARY OF ARGUMENT

This court has foreclosed discussion of the necessity of the State of Washington to amend Article XXVI of its constitution prior to assuming any jurisdiction over Indians and Indian lands within its borders.

On each occasion that the Supreme Court of Washington or a federal court has considered the necessity of the State of Washington amending its constitution prior to taking jurisdiction over Indians and Indian lands, those courts have squarely held that such an amendment was not required by Congress. In three of those eight cases that question was squarely presented to this court on appeal and in each case the appeal was dismissed for want of a substantial federal question. These dismissals constitute rulings on the merits, which the court should now reconsider.

Washington's jurisdictional system is complete in its application to non-Indians living on Indian reservations. These non-Indians are subject to the same law enforcement system as their fellow non-Indians living off the reservation. Unless the crime

falls under the *McBratney* exception to Section 1152 of Title 18 USC, federal law and federal law enforcement services would be exclusively applicable to all crimes by these non-Indians if Washington's jurisdictional system is found invalid by this court.

Washington's jurisdictional system is similarly complete in its application to Indians living on non-trust lands in the State of Washington. Only on non-trust lands is tribal minor criminal jurisdiction displaced by state jurisdiction. On trust lands that tribal jurisdiction is displaced only in eight limited subject matter areas. Outside of those areas, that tribal minor criminal jurisdiction remains in effect.

Washington's jurisdictional system recognizes the strong historical and cultural link between the concept of tribal self-government and Indian land ownership. This link has been recognized by Congress. Washington has left the choice to sever that link in the case of trust lands to the Indians themselves. In so doing, the state has recognized a legitimate interest in, and has left a certain amount of room for, tribal self-government.

To preserve this measure of tribal self-government, Washington has chosen to tie its limitations of self-government to historical concepts of Indian land tenure. The State's scheme protects Indians from crimes by non-Indians. Washington has left to the choice of each tribe whether state law will protect Indians from crimes by Indians. The State's system allows tribes, if they wish, to regulate the conduct of their own members on trust land, with

some exceptions. In eight subject matter areas of fundamental importance to the welfare of all its citizens, Washington has decided to take and exercise jurisdiction.

Washington's jurisdictional scheme is rational and does not deny *any* of its citizens equal protection of the law.

PL-280 itself authorized the taking of less than total geographic and subject matter jurisdiction.

The Department of Interior has consistently concluded that PL-280 authorized Washington to take less than total jurisdiction. Until October of 1977, the Department of Justice had reached the same conclusion.

In enacting the Indian Civil Rights Act of 1968, Congress ratified Washington's jurisdictional system. Prior to that enactment, Congress was informed of tribal objections to Washington's jurisdictional system. Nevertheless, Congress chose to preserve that system rather than to void it.

ARGUMENT

I. INTRODUCTION: THE FULL SCOPE OF THE CHANGES INVOLVED IN A VALID ASSUMPTION OF STATE JURISDICTION

In striking down Washington's assumption of jurisdiction over the Yakima reservation, the Ninth Circuit panel opinion focused on the effect of that assumption of jurisdiction on Indians, without discussing at all its effect on non-Indians. Since the attack was brought by Indians, this is not surprising.

So narrow a focus, however, leaves out a large portion of the total picture.[2]

The scheme of federal jurisdiction over Indian country which is embodied in 18 USC § 1151 (The definition of "Indian Country"), § 1152 (the General Crimes Act), and § 1153 (the Major Crimes Act) embraces all persons, both Indians and non-Indians, and all land, both trust and non-trust, within a reservation. Accordingly, the question of whether state jurisdiction has been validly substituted for this federal scheme pursuant to PL 280 will affect Indians and non-Indians alike.[3]

This court has recently reviewed this scheme of federal jurisdiction in the context of its application both to a non-Indian (*Oliphant v. Suquamish Tribe*, ... U.S. ..... March 6, 1978) and to an Indian (*Wheeler v. U.S.*, ... U.S. ..... (March 22, 1978). We here briefly review it once again, though from a somewhat different perspective. Our purpose is to identify the changes which a valid assumption of state jurisdiction under PL 280 would make in this scheme, with respect both to non-Indians and Indians.

A. **Changes with Respect to Non-Indians.**

In *Oliphant*, this Court held that the criminal jurisdiction of an Indian tribe did not extend to non-Indians in the absence of a treaty or statute providing

[2]In this introduction, we do follow the panel opinion in focusing on criminal, rather than civil jurisdiction. For criminal jurisdiction was the "central focus" of PL. 280. *Bryan v. Itasca County*, 426 US 373, at 380. (1976)

[3]The Yakima reservation is not unlike the Port Madison reservation involved in *Oliphant v. Suquamish Tribe*, ... US ..... (March 6, 1978) Non-Indian residents vastly outnumber the resident tribal members.

for such jurisdiction. Remaining unanswered after *Oliphant* was the next question: granted that the tribe does not have criminal jurisdiction over a non-Indian, who does? Is it the state? Or is it the federal government?

This question, of course, was not before the Court on *Oliphant*. It is before the Court now.

Our starting point is 18 USC 1152.

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
> "This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

By its terms, § 1152 makes federal enclave law applicable to all crimes by non-Indians in "Indian country". None of the three exceptions contained in § 1152 are applicable to non-Indians.[4]

Geographically, § 1152 covers all land within the exterior boundaries of a reservation. This is by reason of the definition of "Indian country" contained in § 1151, which provides in pertinent part as follows:

"Except as otherwise provided in sections 1154

[4]The first two exceptions are applicable by their terms to Indians alone. The third exception, i.e., the treaty exception, is also applicable to Indians alone, if it is applicable at all. See *Oliphant*, slip op. 6, n.8.

> and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent * * *"[5]

Further, federal jurisdiction under § 1152 over crimes committed by a non-Indian is exclusive of any state jurisdiction. *Williams v. U.S.*, 327 US 711, 714 (1946).

There is, however, a judicially engrafted exception to the broad scope of § 1152; that statute does not apply to crimes committed by a non-Indian against the person or property of another non-Indian. *U.S. v. McBratney*, 104 U.S. 621 (1882). Such crimes are subject to the exclusive jurisdiction of the state. But if the crime be against an Indian or his property, or perhaps if there is no identifable victim at all, § 1152 is applicable.[6]

Further, the seriousness of the crime is not a factor under § 1152. If the crime has not been expressly defined and made punishable by Congress, 18 USC 13 (the "Assimilative Crimes Act") becomes operative, and state definitions and punishments are incorporated into federal law. Thus, the whole range

[5]*Cf., Seymour v. Superintendent*, 368 US 351, 358 (1962).

[6]We say "perhaps" because we can find no decisions of this Court or any lower federal court extending the *McBratney* exception to crimes in which there is no identifiable victim. An example would be the alleged offenses of Mr. Belgarde in *Oliphant*, who was charged with "recklessly endangering another person" by reason of his high speed driving within the Suquamish reservation. The "[an]other person" would be anyone, Indian or non-Indian, who happened to be in the vicinity of Mr. Belgarde's speeding vehicle. Slip. op. 3.

For a discussion of the problem of the scope of the *McBratney* exception to § 1152, see the Brief for the United States as Amicus Curiae in *Oliphant*, p. 16, n. 12.

of potential criminal conduct is covered by federal law, from the most serious felonies to the most minor misdemeanors.

Residing on the reservation is a total population of approximately 25,000, of which approximately 3,000 are members of the Yakima tribe. See p. 13, *supra*. For these non-Indians, approximately 22,000 in number, the practical consequences which would flow from striking down as invalid Washington's assumption of jurisdiction over the Yakima reservation are now clear:

Washington criminal law would not apply to these non-Indians, unless the crime falls under the *McBratney* exception to § 1152. Federal law and federal law enforcement services would be *exclusively* applicable to crimes by these non-Indians, no matter how serious or how minor the crimes and no matter where they were committed within the reservation.[7]

If, on the other hand, Washington's assumption of jurisdiction is valid, these non-Indians are subject to the same law enforcement as their fellow non-Indians living off the reservation. Sec. 1152 would be completely inapplicable.

Such are the consequences for non-Indians on the reservation; for them, the alternatives are com-

[7]The federal law, of course, may be "borrowed" from state law, pursuant to the Assimilative Crimes Act. But even in these cases, the law enforcement officers must be federal, and the trial must be in federal district court.

Section 1152 was obviously designed for the situation on Indian reservations before they were opened up for non-Indian settlement by the General Allotment Act of 1887, a situation in which non-Indians were "few and far between." Indeed, § 1152 was last amended in 1854, 10 Stat. 270. The only attempt to conform it to 20th century realities is found in PL 280 itself.

plete federal jurisdiction (except as limited by *McBratney*) or complete state jurisdiction. We turn next to the consequences for the Indians themselves.

B. **Changes with Respect to Indians.**

The changes here are more complex. This is by reason of the federal scheme established by 18 USC 1151, 1152, 1153 and the Civil Rights Act of 1968, and complexities in chapter 37.12 RCW as well. We take up first the federal scheme, apart from PL 280 and chapter 37.12 RCW.

Because they only apply to crimes by Indians, the exceptions in § 1152 become important, as do the exceptions to those exceptions found in § 1153, the Major Crimes Act.

Our starting point is § 1152, the first paragraph of which makes federal enclave law applicable to all crimes on a reservation, whether committed by an Indian or non-Indian. If a crime is committed, however, by an Indian against the person or property of another Indian, the first exception in § 1152 (contained in the second paragraph) is applicable, and tribal jurisdiction is exclusive. (This first exception might be viewed as the Indian counterpart of the *McBratney* exception.) In addition, tribal jurisdiction may be exclusive if the tribal criminal system has first punished the Indian offender, even though no Indian victim is involved. This is by reason of the second or "double jeopardy" exception. (For all practical purposes, we believe that the third or "treaty" exception may be disregarded as practically inoperative.) The applicability of these exceptions, it should be noted, is in no way dependent on the seriousness of the offense.

If, however, the crime by the Indian falls within § 1153, (the Major Crimes Act), the § 1152 exceptions become inapplicable; for § 1153 contains no parallel exceptions, and indeed was enacted precisely to cover part of the gap created by those exceptions.[8]

Whether § 1153 establishes exclusive jurisdiction in the United States, or only jurisdiction concurrent with the Tribe, has not been decided by this court. *Oliphant*, p. 12, n. 14. However,

> "The issue of exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts to a term of 6 months or a fine of $500." *Oliphant*, p. 12, n. 14.

Though the distinction between "major" and "minor" crimes may not be entirely tidy, a summary description of the federal scheme may be cast in those terms. "Major" crimes committed by Indians are under exclusive federal jurisdiction; "minor" crimes are under the exclusive jurisdiction of the tribe if they involve an Indian victim; and "minor" crimes involving no Indian victim are also under the exclusive jurisdiction of the tribe if the tribe tries and punishes the Indian offender before the United States does.

From this description, the alternatives with re-

[8]For the history of the Major Crimes Act, see *Keeble v. U.S.*, 412 U.S. 205 (1973).

spect to crimes by Indians become clear. If the State's assumption of jurisdiction is valid, state jurisdiction will displace federal jurisdiction with respect to "major" crimes, and will displace tribal jurisdiction with respect to "minor" crimes.[9]

This last point deserves emphasis. The displacement of tribal criminal jurisdiction which will occur if the State's assumption of jurisdiction is valid involves solely minor crimes by Indians. All other displacement affects federal, not tribal jurisdiction.

Further, under Washington's assumption of jurisdiction over the Yakima reservation, even this displacement of tribal criminal jurisdiction is far from total. For it occurs if, and only if, the offense by the Indian takes place on non-trust land. If the offense takes place on trust land, then either federal or tribal law will apply, depending upon whether the offense is "major" or "minor."[10]

To summarize: After passage of the 1968 Indian Civil Rights Act, the only criminal jurisdiction which the Congress has left with the tribe is jurisdiction over minor crimes committed by its own members. The State's assumption of jurisdiction would displace this jurisdiction, but only to a limited extent, *i.e.*, when the crime takes place on non-trust lands.[11] To

[9]We are here assuming, we recognize, that state jurisdiction under P.L. 280 is exclusive of both federal and tribal jurisdiction, rather than merely concurrent. The district court so concluded (App. pp. 6-7), reasoning that state jurisdiction was clearly exclusive in mandatory states, and was intended to be exclusive in option states as well. The Ninth Circuit did not reach this issue.

[10]There is an exception to this general statement. If the crime by an Indian falls within one of the eight special areas contained in RCW 37.12.010, state jurisdiction would cover such a crime even if committed on trust land.

[11]See, however, n. 10, *supra*.

this same limited extent, it would displace federal jurisdiction over major crimes by Indians. But it would totally displace federal jurisdiction over all crimes by non-Indians.

Lastly, the relationship between the two sets of changes should be noted. If Washington's assumption of jurisdiction over the Yakima reservation is invalidated on equal protection grounds, but only as applied to Indians, we see no reason why the jurisdictional changes for non-Indians could not stand.[12] If, however, this assumption of jurisdiction is invalidated on the grounds that it violates the provisions of PL 280, because PL 280 requires assumption of full jurisdiction or none at all, both sets of jurisdictional changes are invalid. Non-Indians as well as Indians remain under the old jurisdictional scheme.

II. THE QUESTION OF THE NECESSITY FOR THE STATE TO AMEND ARTICLE XXVI OF ITS CONSTITUTION, THE SO-CALLED "DICLAIMER ISSUE," IS NOT PROPERLY BEFORE THE COURT.

At the outset, we would like to dispose of one false issue, which is not properly before this court.

In 1957, and again in 1963, Washington assumed jurisdiction over Indians and Indian reservations without first amending Article XXVI of the

[12]The panel opinion would invalidate RCW 37.12.010 in its entirety. "The whole statute must be rewritten, a task manifestly beyond our constitutional competence." Juris. Stat. A, p. 36. That opinion did not, however, consider the severability issue in the context of applying RCW 37.12.010 to non-Indians only. And as that opinion seems to recognize, any severability issue is ultimately one of state law, to be decided by state courts. Juris. Stat. App. A, p. 35, n. 9.

state constitution (the disclaimer clause). That article, in relevant part, reads as follows:

> "The following ordinance shall be irrevocable without the consent of the United States and the people of this state:
> "* * *
> "That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying with the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States * * *"

Appellee argued strenuously to both the district court and the Court of Appeals the need for the State to amend that article. Both courts rejected that argument.

In noting probable jurisdiction in this case, the court directed the parties to address the following issue:

> "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

We view the court's direction as foreclosing discussion of the necessity of the State of Washington's amending the disclaimer clause prior to assuming *any* jurisdiction over Indian reservations within its

borders, and limiting discussion to the statutory and constitutional validity of the partial geographic and subject matter jurisdiction exercised by the State. Opposing counsel does not agree with this view, however, and feels that the disclaimer issue is still present in the case. Because of this disagreement, on March 10, 1978, we sought the assistance of the clerk in clarifying the scope of the court's language in noting probable jurisdiction. We were subsequently informed by the clerk that we should present any arguments in support of the validity of the State's jurisdiction which we "deemed appropriate" in light of the language of the court's order. Because, as we will demonstrate below, the court has on three previous occasions ruled on the merits in favor of the State's position regarding this issue, we do not deem it appropriate to fully brief and argue it a fourth time, and are confident that the court, in its order noting probable jurisdiction, did not intend to indicate its willingness to reconsider its earlier decision on the merits.

In at least eight previous reported cases, including 3 in which their claims were rejected by this court, various Indian tribes or individual Indians have attempted to persuade some court that the State of Washington could not validly assume any jurisdiction over Indians or Indian reservations without first amending Article XXVI of its constitution.

In each case in which that question was presented to either the Supreme Court of the State of

Washington, or to a federal district or appellate court, those courts squarely held that such an amendment was not required by Congress. *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959); *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, cert. den. 387 U.S. 907 (9th Cir., 1966); *Dixon v. Rhay*, 396 F.2d 760 (9th Cir., 1968); *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590, app. dism'd 397 U.S. 316 (1969); *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744, app. dism'd 420 U.S. 915 (1974); *Comenout v. Burdman*, 84 Wn.2d 192, 525 P.2d 217, app. dism'd 420 U.S. 915 (1974). Both the district court and the court of appeals adhere to that view in this case. *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, 550 F.2d 443, 444 (9th Cir., 1977), Jurisdictional Statement, Appendix C, pp. 38 and 39. In three of those cases that question was squarely presented to this court on appeal, and in each case the appeal was dismissed for want of a substantial federal question. *Makah Indian Tribe v. Washington*, 397 U.S. 316 (1970); *Tonasket v. Washington*, 420 U.S. 915 (1975); *Comenout v. Burdman*, 420 U.S. 915 (1975). Furthermore, in dismissing the appeals in *Tonasket* and *Comenout*, the court had directly before it the so-called "newly discovered legislative history" relied on so heavily by the appellees here as well the appellants in those earlier cases. See *e.g.*, the Jurisdictional Statement in *Comenout*, October Term 1974 No. 74-707, Appendices M and N.

The dismissals in *Makah*, *Tonasket*, and *Comenout* were direct adjudications on the merits of that issue by this court, and the court below recognized that reality and followed the precedent thus established. *Confederated Bands and Tribes of the Yakima Nation v. State of Washington, et al.*, 550 F.2d 443, 444, Jur. St., Appendix C, pp. 38 and 39. In *Hicks v. Miranda*, 422 U.S. 332 (1975) Justice White, speaking for the majority, said:

> "We agree with appellants that the District Court was in error in holding that it could disregard the decision in Miller II. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement. As Mr. Justice Brennan once observed, '[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. * * *' Ohio ex rel. Eaton v. Price, 360 US 246, 247, 3 L Ed 2d 1200, 79 S Ct 978 (1959); * * *" 422 U.S. at 343 and 344

Apparently the dissenters in that case, a (5-4 decision) had no quarrel with that language, as their

disagreement was directed only to Part III of the opinion, which dealt with an entirely separate question.

This court had before it all of the relevant arguments which appellees could submit in support of their position on the disclaimer issue, including the "newly discovered legislative history" when it dismissed *Tonasket* and *Comenout* for want of a substantial federal question, and when it noted probable jurisdiction in this case and directed the parties to address the question of whether or not the "partial geographic and subject matter jurisdiction" exercised by the State was statutorily and constitutionally valid (see, *e.g.*, the Memorandum For The United States As Amicus Curiae at p. 12, n. 8 and p. 13, and the Brief For The United States As Amicus Curiae in *Oliphant v. The Suquamish Indian Tribe*, No. 76-5729 at pp. 54-58.

For that reason we are convinced that the court, in framing the issue set out in its February 27, 1978 order noting probable jurisdiction, did not in any way indicate to the parties their willingness to reconsider the disclaimer issue which it has on three previous occasions decided on the merits, and we do not deem it appropriate, and will not fully brief and discuss that issue herein.

III. WASHINGTON'S ASSUMPTION OF JURISDICTION OVER THE YAKIMA RESERVATION DOES NO VIOLATE THE EQUAL PROTECTION CLAUSE

In invalidating Washington's assumption of

jurisdiction over the Yakima reservation, the panel opinion stated:

> "We hold that Washington's partial assumption of jurisdiction based upon *this land title classification* cannot withstand the Yakimas' equal protection attack and we strike down Sec. 37.12-.010." (Footnote omitted) (Emphasis supplied) (Juris. Stat. App. A. p. 33)
>
> "Third, we need not here decide whether the Supreme Court continues to espouse the traditional two tier equal protection approach, because Washington's *title based* classification fails to meet any formulation of the rational basis test.". (Footnote and citations omitted) Emphasis supplied) (I bid., p. 34)
>
> "The operative criterion of the criminal jurisdiction classification at issue is the *status of title.*". (Emphasis supplied) (Ibid.)

The panel opinion thereby showed its complete misunderstanding of exactly what the State did in adopting RCW 37.12.010 and, more importantly, why. Once the statutory scheme embodied in RCW 37.12.010 and the reasons for the adoption of that scheme are understood, any serious equal protection problem disappears. Accordingly, we shall here simply explain that scheme and the reasons for its adoption in the light of the practical problems with which the State was confronted.

Assume a reservation in which there is no "checkerboarding" at all; *i.e.*, all of the land is trust land. No one would then seriously argue that Indians were denied equal protection of the laws if state jurisdiction stopped at the reservation boundary. It is perfectly constitutional to apply state law to Indians

who are outside of the reservation, but not to apply it to Indians inside the exterior boundaries of the reservation.

That was exactly the situation prior to RCW 37.12.010 and is the situation in many states today. (Compare *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), upholding state taxation on an Indian tribe with respect to off-reservation activities, and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) invalidating state taxation of the income of a reservation Indian.)

Of the 23 reservations in Washington, only 7, all small, consist entirely of trust land. On all of the other reservations, a "checkerboard" pattern of land ownership exists, at least to some extent.[18]

What the state legislature did, confronted with this pattern of land tenure within Indian reservations, was simple and sensible. It said that with respect to crimes committed on non-Indian lands within the exterior boundaries of a reservation, state jurisdiction would apply to Indians and non-Indians alike, just as if that land were located outside the boundaries of the reservation.

The Cities of Wapato and Toppenish, for example, are both located within the exterior boundaries of the Yakima Indian Reservation, but are on land almost entirely owned by non-Indians. The state legislature decided that those cities were to be treated

[18]See The Legal Relationship Between Washington State and its Reservation-based Indian Tribes, Office of Program Research, House of Representatives, Olympia, Washington, December, 1977, pp. 24-45, for a description of the ownership patterns on each reservation.

just as if they were outside the exterior boundaries of the Yakima reservation. If a Yakima Indian shops on non-Indian land in downtown Wapato, the legislature saw no reason that state jurisdiction should not apply to him just as if he were in downtown Yakima or Seattle. In other words, the legislature recognized the reality of the so-called "checkerboarding" but left the Indian lands remaining within the exterior boundaries in a special status because of the overriding interest of the tribes in those lands.

We need hardly point out that the checkerboarding on Washington's major reservations and the practical problems stemming from it are not of the State's own making. Rather, they come about by reason of federal policies, as embodied, for example, in the General Allotment Act of 1887.

The term "checkerboarding", incidentally, is a sometimes deceptive term. Large areas of the Yakima Reservation contain almost no non-Indian land; other parts of the reservation, like Wapato and Toppenish, are overwhelmingly non-Indian, both in land ownership and in population. So also on the Puyallup reservation, the term seems inappropriate; for there is almost no trust land at all.

In recognition of that special status for trust lands, the tribes were given a choice, even though PL 280 did not require the state to offer that choice. The legislature in effect said to the tribes: "With respect to your own lands, you can either have state jurisdiction apply, just as on non-Indian lands, and

just as on lands outside the reservation; alternatively, you can continue to have those trust lands primarily subject to federal or tribal law. If you feel so strongly about the concept of tribal self-government that you want to limit the extension of state jurisdiction", the Indians were told, "you can do so. But you can do so only with respect to lands which still retain the character of an Indian reservation, *i.e.*, Indian lands."

The legislature recognized, in short, the strong historical and cultural link between the concept of tribal self-government and Indian land ownership. Whether that link was to be severed in the case of trust lands was left largely to the individual tribe. The State has thus left a certain amount of room for tribal self-government, the amount of room being determined in part by the type of land tenure involved.

What is irrational about that? What *is* irrational is a decision that allows the Indians who made such a choice to challenge its effects as unconstitutional.

In fact, Congress has itself recognized this link between tribal self-government and land tenure. It did so in the General Allotment Act of 1887 (Act of Feb. 8, 1887, 24 Stat. 388), which has been aptly described by President Theodore Roosevelt as " 'a mighty pulverizing engine' to break up the tribal mass."[14] That act, it must be remembered, did essentially two things: It provided the mechanism for individual Indians to receive lands in individual allot-

[14]Cohen, Federal Indian Law (Univ. of N.M. reprint) p. 154.

ments, free from all restrictions against alienation (in other words, to turn trust lands to non-trust lands), after a certain trust period, and simultaneously provided the mechanism for Indians on those lands to become subject to state jurisdiction, thereby eliminating tribal self-government over those lands once they had been turned into fee lands.[15]

Congress again recognized this same link in 1934, in the Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 984), when it stopped the "pulverizing" by switching to a policy of strengthening tribal self-government and, as part of this policy, brought the allotment system to a halt and continued indefinitely the restrictions on alienation of land already allotted.[16]

If the State of Washington wishes to allow the preservation of a measure of tribal self-government, in order to accommodate the desires of its Indian citizens, why is it irrational to tie those limitations on tribal self-government to historical concepts of Indian land tenure? By giving the Indians the choice either to retain a certain measure of tribal self-government or to subject themselves entirely to state jurisdiction, the State has now been determined by the 9th Circuit to have violated the Indians' rights to equal protection. The rationality of that conclusion escapes us.

In the panel opinion, the 9th Circuit stated:

"* * * Under R.C.W. § 37.12.010, a Yak-

[15]For a general discussion of the purpose and structure of the General Allotment Act, see Cohen, *supra*, n. 2, p. 206 ff.

[16]For a general discussion of the effect of the Indian Reorganization Act on the allotment system, see Cohen, n. 2, p. 217 ff.

> ima Indian living on a parcel of non-fee land who is the victim of a crime has no law enforcement protection from Washington, but a Yakima Indian living on the adjoining parcel of fee land who is the victim of the same crime has law enforcement protection from Washington. * * *" Juris. Stat. App. A, p. 33.

This completely misstates the problem, and misconstrues RCW 37.12.010.

RCW 37.12.010 provides "protection" to a person by regulating the conduct of other persons. Under that statute, if a non-Indian commits a crime against an Indian victim living on a parcel of trust land, the State *does* afford the Indian law enforcement protection. For that non-Indian is subject, under RCW 37.12.010, to the full range of state criminal laws.

What the State has really said, under RCW 37.12.010, to that Indian living on trust land, is this: "We will protect you from the non-Indian. But you must look to the federal government or the Yakima Indian Tribe for your protection from a fellow Indian, and you must do so because *that is the choice that the Yakima Tribe has made for you.*".

The State did not rest its distinction between non-trust and trust lands on the basis of the difference in the "need by the land occupants for law enforcement". Panel opinion, Juris. Stat. App. A, p. 35. Rather, it based the distinction upon a desire to allow the tribes, if they wish, to regulate the conduct of their own members on trust land. It left the question of the need of the Indian land occupants for state law enforcement services up to the tribe itself.

But the choice which the State gave to the Yakima Tribe was, by reason of the eight enumerated categories, not a complete one. The State decided there were eight special areas of subject matter jurisdiction which were so fundamental and important that they would not be left to tribal self-government. But what is irrational about such a decision?

This Court has recently stated that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). Moreover, this Court has recognized that "[p]erfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976).

These principles, we submit, are applicable here, and require a reversal of the Ninth Circuit's panel decision.

Further, Washington's jurisdictional system is certainly no less rational than the federal jurisdictional system which this Court upheld in *United States v. Antelope*, 430 U.S. 641 (April 19, 1977).

In *Antelope*, an enrolled Coeur d'Alene Indian was convicted by a federal court of burglary, robbery and the murder of a non-Indian within the boundaries of the Coeur d'Alene Indian reservation. The

first degree murder conviction was based upon the felony murder provisions of 18 U.S.C. § 1111, made applicable to Indians by the Major Crimes Act, 18 U.S.C. § 1153. Under that rule the federal prosecutor was not required to prove premeditation and deliberation, while, if tried in the Idaho court, such intent would have been necessary elements of the crime. The Court of Appeals reversed on the ground that Antelope had been denied both equal protection and due process in that his conviction was racially discriminatory since a non-Indian charged with the same crime would have been subject to prosecution only under Idaho law, where it would have been necessary to prove intent. This court reversed holding that the federal statutes were not based on an impermissible racial classification, and that the challenged statutes did not otherwise violate equal protection. This court there said:

> "There remains, then, only the disparity between federal and Idaho law as the basis for respondents' equal protection claim. Since Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country, *United States v. Kagama*, 118 U.S. 375 (1886), it is of no consequence that the federal scheme differs from a state criminal code otherwise applicable within the boundaries of the State of Idaho. Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter." 430 U.S. 641, 648.

While admittedly this Court did not directly discuss the equal protection issue in those terms, the

fact is that Antelope was prosecuted by the federal government, rather than the State of Idaho, under a jurisdictional system based upon the status of land.

Under that system, federal law rather than state law applied to Antelope precisely because the crime took place within the confines of a reservation, *i.e.*, because it took place on land that was either trust land at the time of the crime or had been trust land at one time in the past. Reservation boundaries, after all, are really based upon a land title status, albeit often a purely historical status; they mark the geographical limits of what either is or once was trust land.

Washington's system differs from the federal in that it is based upon the current status of land title, not the past status. But this makes the Washington system more rational than the federal, not less.[17]

IV. CONGRESS, IN ENACTING PL 280 AND IN LATER ENACTING THE INDIAN CIVIL RIGHTS ACT OF 1968, AUTHORIZED AND RATIFIED WASHINGTON'S ASSUMPTION OF LESS THAN COMPLETE JURISDICTION OVER APPELLEE AND ITS MEMBERS.

In 1963 Washington could have taken complete

[17]Throughout the United States, on military reservations, in National Parks, and in other federal enclaves there exist systems of triple "checkerboarding"; areas of exclusive federal jurisdiction, exclusive state jurisdiction, and concurrent federal-state jurisdiction. This pattern results from the method by which federal title was obtained, and the response of state legislatures to the acquisition of federal title. See Art. 1 § 8 of the U.S. Constitution. Indeed, the framers of the Constitution themselves contemplated checkerboarded sysems of jurisdiction. See Rupp, Jurisdiction over lands owned by the United States within the State of Washington. 14 Wash. L. Rev. 1 (1939).

jurisdiction over Indians and Indian lands within its boundaries. It chose, however, to accommodate the desires of the Indians to a maximum of tribal self-government and take less than total jurisdiction. Now it faces a challenge by the beneficiaries of that accommodation who assert that the state's concern for Indians' self-government is in violation of the provisions of PL 280.

The State in fact did what Congress required—it *obligated and bound itself* to assume jurisdiction, but, with the exception only of eight specific subjects, it left to the tribes the determination of the extent of the exercise of that jurisdiction over Indians while on Indian land. Since this limited subject matter jurisdiction applies only on trust lands, it has been labeled as partial by the appellees. State jurisdiction is, however, complete as to all non-Indians on reservations since the State placed no geographic or subject matter limitations on its exercise of jurisdiction over them. It is also complete as to Indians on non-trust lands.

The State system was upheld in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir., 1966), cert. den. 387 U.S. 907, and *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969), Appeal dismissed, 397 U.S. 316 (1970). See, discussion at p. ....., *infra*. Until the Solicitor General's brief was filed with this court in *Oliphant v. Suquamish Indian Tribe* in October, 1977, it was also the consistent and unequivocal position of the United States that Washington's jurisdictional system was

valid in all respects. *Cf.* Memorandum for the United States in *Quinault Tribe of Indians v. Gallagher*, No. 1040, October term, 1966, at 5-8, with Brief for the United States as Amicus Curiae in *Oliphant Suquamish Indian Tribe*, No. 76-5729, October term, 1977, at 49-58, and Memorandum for the United States as Amicus Curiae, *State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388, October term, 1977, at 11-12 and note 8 at 12.

Washington's jurisdictional scheme and the purposes it serves complies fully with the terms of PL 280 *and* with the intent of Congress in enacting it.

A. **Public Law 280 did not preclude Washington from enacting its statutory scheme.**

Two essential concerns motivated Congress to enact Public Law 280: lawlessness on certain Indian reservations and the absence of adequate tribal institutions for law enforcement; and the lack of adequate Indian forums for resolving private legal disputes between reservation Indians and between Indians and other citizens. *Bryan v. Itasca County*, 426 U.S. 373, 379 and 383 (1976). While PL 280 was assimilative in character, it was not intended to effect complete assimilation of Indians and Indian tribes. *Id.*, at 387-389. When Congress intended complete assimilation, it knew how to accomplish it. *Id.* at 389. It did not transfer jurisdiction over the tribes themselves to the states and it contemplated the continued vitality of tribal government. *Ibid.*

While neither the actual text of the act nor the

legislative history provide a definitive answer to the "partial" jurisdiction issue, what can be gleaned from the act and the circumstances surrounding its passage, we suggest, supports the proposition that Congress intended to permit Washington to choose its unique jurisdictional scheme.

The language of PL 280 itself supports the State's position in that respect. Section 6 of the act gave the consent of the United States to those States having disclaimer provisions in any enabling act to remove existing legal impediments to the assumption of civil and criminal jurisdiction over Indians and Indian lands "in accordance with the provisions of this act". Section 7 of that act provides:

> "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time *and in such manner* as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." (Emphasis supplied) (App. p. .....).

Reading §§ 6 and 7 of PL 280 together, as one must, Congress in 1953 gave its consent to any state not having jurisdiction over Indians and Indian lands to assume such jurisdiction, either totally or "in such manner," *i.e.*, less than total, "as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

The legislative history reveals that Congress was aware of a variety of responses to the option of taking

jurisdiction over criminal or civil matters involving Indians and Indian land. Senate Report 699, 83rd Congress, 1st Sess. 6-7 (1953), Letter from Assistant Secretary of Interior to Chairman of House Interior and Insular Affairs Committee. In considering § 7, the House Interior Committee reported as follows:

> "This provision would operate with respect to Nevada, and other states similarly situated. In Nevada, authorities of some counties have indicated their willingness to accept jurisdiction, others opposed it, and still others stated they would accept such jurisdiction only with an accompanying federal subsidy. The reported bill leaves open for such states the door to acquiring jurisdiction in the future." Senate Report 699, at p. 6.

The report does not intimate that such approaches to jurisdiction would be inappropriate under PL 280 if pursued by the option states.

Congress also assumed that some experimentation might occur once a state had gone through that "open door" to acquire jurisdiction in the future. This assumption is indicated by the fact that the Department of Interior conferred extensively with representatives of mandatory states and the Indian tribes before presenting a bill to Congress in 1953. *Id.* at 6 and 7. Both the mandatory states and the tribes therein had agreed to an assumption of complete civil and criminal jurisdiction prior to the introduction of the bill. However, very few of the option states and tribes therein were consulted. By failing to consult them extensively but by vesting option states with the power to assume jurisdiction, it is reasonable to

conclude that Congress was prepared to permit various jurisdictional arrangements to be developed at the state level.

Although Congress gave no direct indication of how much less than complete jurisdiction might be assumed, it did give some indication that partial geographic and subject matter jurisdiction was acceptable.

Textual support for the assertion of partial jurisdiction, in a subject matter context, can be found in § 7 of PL 280. There Congress gave the option states consent to take jurisdiction "with respect to criminal offenses *or* civil causes of action."[18]

By its failure to repeal certain statutes, Congress gave further evidence of its continuing intent to allow option states to experiment with partial subject matter jurisdiction. In 1929 Congress authorized the Secretary of Interior to promulgate regulations allowing state authorities to enter Indian trust and non-trust lands for the purpose of inspecting health and educational conditions and enforcing sanitary and quarantine regulations. 25 USC § 231. Though the Department of Interior has never promulgated regulations under the statute, this does show a Congressional intent to allow partial subject matter jurisdiction. An amendment to the statute in 1946 authorized

[18]Although § 6 uses the language "assumption of civil *and* criminal jurisdiction," that assumption is done "in accordance with the provisions of this act," that is, § 7. Furthermore, Congress showed no aversion to such partial assumptions of jurisdiction when it separately conferred criminal jurisdiction over Indians and Indian lands on the State of New York in 1948 and civil jurisdiction over the Indians and Indian lands on New York in 1950. See, Act of July 2, 1948, Chap. 809, 54 Stat. 1224, 25 USC § 232 (criminal jurisdiction); Act of September 13, 1950, Chap. 947, 64 Stat. 845, 25 USC § 233 (Civil jurisdiction).

the states to enforce state compulsory school attendance laws against Indian children and parents. 25 USC § 231(a). This provision shows Congress' intent to allow the states to deal with particular subject matter areas. The failure to repeal these provisions in 1953 suggests a continuing intent on the part of Congress to allow option states to experiment with partial subject matter jurisdiction.

Public Law 280 itself not only authorizes but requires partial geographic jurisdiction. Section 2(a), 18 USC § 1162(a) exempted from the jurisdiction of Minnesota, the Red Lake Reservation, from the jurisdiction of Oregon, the Warm Springs Reservation, and from the jurisdiction of Wisconsin, the Menominee Reservation.

Both the dissenting judges in the Ninth Circuit's *en banc* opinion in this case and the Solicitor General of the United States agree that the assumption of jurisdiction on a reservation by reservation basis, rather than over all Indian country within the state, was within Congressional intent. *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington*, 550 F.2d 443, at 450 (9th Cir. 1977); Brief of the United States in this case, at 12.

There is no indication in the House or Senate reports accompanying PL 280, or in the formerly unpublished transcripts of hearings held by the committee which approved PL 280 or in the statute itself to suggest that PL 280 was designed to resolve jurisdictional distinctions based on the trust or non-trust

status of land. The act maintains the separate status of tribal trust land in the proviso clauses of § 2(b) and § 4(b), which provide as follows:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * *" (App. p. .....)

The very use of a trust land distinction in these sections of PL 280 suggests the appropriateness of a Washington's implementing legislation which gives significance to that distinction. Significantly, in 1967, the United States unequivocally supported that legislation. See Memorandum for the United States in *Quinault Tribe of Indians v. Gallagher*, No. 1040, Oct. Term, 1966, at 5, 7-10.

Even today, the Solicitor General, in the context of a different case, continues to espouse on behalf of the United States a position totally inconsistent with the one he takes here. Compare the Petition for Certiorari in *U.S. v. John*, Oct. Term, 1977, No. 77-836 at 11-12, 17-19, with the memoranda for the United States in *Oliphant v. Suquamish Indian Tribe*, *supra*, and in this case. In *John* the respondents were charged with the violation of the Major Crimes Act in Indian country in Mississippi. The Court of Appeals dismissed the prosecution on the basis, *inter alia*, that Congress could not have intended federal jurisdiction to apply to Indian trust lands interspersed with non-

Indian land in checkboard fashion. But in that case the Solicitor General vigorously supported the establishment of a checkerboard system of jurisdiction in the State of Mississippi—a position he opposes here.

B. **The State's position is consistent with the federal interpretation of congressional intent prior to October of 1977.**

The construction of an act of Congress by the Interior Department, the agency with the primary responsibility for Indian affairs, is clearly entitled to consideration by this court, *Shapiro v. U.S.*, 335 U.S. 1, 12 note 13 (1947); *U.S. v. Jackson*, 280 U.S. 183, 193 (1930). In 1963 the Department of Interior was requested by the chairman of the Committee on Interior and Insular Affairs to comment on S. 143, a bill which, if passed, would have amended PL 280 explicitly to provide for the assumption of partial jurisdiction.

In a letter dated April 17, 1963, over the signature of Assistant Secretary John A. Carver, Jr., commented on those provisions of S. 143, a bill which would have amended §§ 6 and 7 of PL 280:

> "The bill amends sections 6 and 7 in the following respects:
> "* * *
> "2. A State may, by agreement with the tribe, assume criminal or civil jurisdiction with respect to a designated geographical area of Indian country, or with respect to designated subjects such as marriage and divorce, juvenile offenses, commitments to State institutions, etc. The State need not assume full jurisdiction. *We do not regard this as a change in the law. It merely*

makes explicit a conclusion which we think is implicit from the present language of P.L. 280." (emphasis supplied) A copy of that letter is attached hereto as App. A.

The Department of Interior continued to maintain that PL 280 authorized a partial assumption of jurisdiction in 1968. That year Harry R. Anderson, Assistant Secretary of Interior, responded to a request from Wayne N. Aspinall, concerning Interior's recommendations on S. 1843. Title III of this bill was the immediate predecessor to Title IV of PL 90-284, the 1968 Indian Civil Rights Act. Mr. Anderson observed:

"Title III, which relates to State assumption of civil or criminal jurisdiction over Indian reservations, changes the present law now embodied of section 7 of Public Law 280, 83rd Congress: * * * *(b) by making explicit an authority which we believe is now implicit—an authority to assume partial jurisdiction, or piecemeal jurisdiction either by geographic area or by subject matter;* * * *" (emphasis supplied)

In the letter Mr. Anderson observed further:

"The second change is a change of form and not a change of substance, because *the present law permits the States to assume partial jurisdiction either by geographic area or subject matter.* Some of the States have in fact done so. For example, Nevada has assumed jurisdiction over limited areas. Idaho has assumed jurisdiction over limited subject matter (compulsory schools, public assistance, domestic relations, mental illness, juvenile delinquency, dependent children). *Washington has assumed jurisdiction over both limited areas and limited subject matter.*" (emphasis supplied)

Inasmuch as this part of Title III is a clarification rather than a change of present law, we have no objection to it."

Letter from U.S. Department of Interior to The Honorable Wayne N. Aspinall, Chairman, House Comm. on Interior and Insular Affairs, March 27, 1968, reproduced at pp. 24-26 of Hearings on Rights of Members of Indian Tribes, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong. 2d Sess. (1968). The letter is attached hereto as Appendix B.[19]

Until 1977 the Solicitor General took a position consistent with that of the Department of Interior. In his Memorandum for the United States in *Quinault Tribe of Indians v. Gallagher*, Oct. Term, 1966, No. 1040, at 5, 7-10, he fully supported the validity of Washington's assumption and exercise of jurisdiction over Indians and Indian reservations.

C. Subsequent legislative action confirms Congress' intent to preserve Washington's jurisdictional system.

(1) *The law of Quinault v. Gallagher.*

In *Quinault Tribe of Indians v. Gallagher*, *supra*, at 653, 657-658, and *Makah Indian Tribe v. State*, *supra*, at p. 489, 491-492, the tribes objected to Washington's jurisdictional scheme as violative of PL 280, in part, because it provided for " partial" jurisdiction over them.

In *Quinault*, the Court of Appeals dealt with the

[19]In the letter Mr. Anderson reviews a bill, S. 1843, which amended PL 280 to provide in explicit terms that States may assume "such measures of jurisdiction over any or all of" offenses committed within "Indian country or any part thereof as may be determined" by the States. Title III, Section 301(a) of S. 1843. A similar provision is contained in Section 302(a) of the same bill.

"partial" jurisdiction issue by treating Washington's assumption as total:

> " * * * We do not read that act as constituting only a partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a tribal resolution and gubernatorial proclamation. * * *" 368 F.2d 657, 658.

The court concluded that if the Quinaults felt aggrieved because state jurisdiction exercised under the 1963 act was not being exerted to the fullest extent possible:

> " * * * all it has to do is provide the governor with a tribal resolution of the kind called for in section 5 of that act (RCW 37.12.021). A governor's proclamation would necessarily follow, and a full exertion of state jurisdiction would be achieved." 368 F.2d 658.

When the question was raised once again three years later before the State supreme court, that court adopted the reasoning of the Ninth Circuit in *Quinault* and again affirmed the validity of the State act. *Makah, supra.*

After the *Quinault* decision, the law in the State of Washington and throughout the Ninth Circuit was that PL 280 did allow the assumption of jurisdiction both by subject matter and by geographic area. When Congress had been informed in 1963 that PL 280 allowed the partial assumption of geographic and subject matter jurisdiction, of course, no federal court

had ruled on the issue. In its 1963 opinion, the Department of Interior reached the same result as the Ninth Circuit later adopted in *Quinault.* In its 1968 opinion the Department again reached the same result. In his memorandum for the United States in *Quinault*, the Solicitor General had also concluded that Washington's jurisdictional scheme was valid under PL 280.

While Congress is deemed to know the state of the law when it enacts legislation, including decisional law, *Shapiro v. U.S.*, 335 U.S. 1, 16 (1947); and the pertinent administrative agency's interpretation of the law, *Missouri v. Ross*, 299 U.S. 72, 75 (1936); there are other indications that Congress had been specifically informed of the *Quinault* litigation. On June 23, 1965, during hearings on the constitutional rights of American Indians, the Quinault Tribe told the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary about the *Quinault* litigation.[A] James Jackson, Tribal Chairman of the Quinault Tribe, objected to the tribes having been brought under the provisions of the 1963 law which extended "partial jurisdiction to the reservation regardless of the wishes of the tribe concerned." 1965 hearings at 102. Mr. Jackson requested an amendment to S. 966, a predecessor to PL 90-284, pursuant to which the State and the tribe would share jurisdiction only to the extent that agreement between the two was reached. 1965 hearings at 101-103. Senator Ervin inquired into the status of the

Quinault litigation, at which point Charles Hobbs, an attorney for the Quinault Tribe, responded:

> "Mr. Hobbs: It is to be argued before the Ninth Circuit Court of Appeals on July 8. We lost in the trial court, and the effort there will be to get a reversal." 1965 hearings at 103

(2) *In enacting the Indian Civil Rights Act of 1968, Congress ratified Washington's jurisdictional scheme.*

When Congress finally amended PL 280 by § 403 of Title IV of the 1968 Civil Rights Act, two years after the decision in Quinault, it ratified all jurisdictional schemes enacted under PL 280. Section 403 reads, in pertinent part, as follows:

> "(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, *but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.* Public Law 90-284, Title IV, Section 403, April 11, 1968, 82 Stat. 79. (Emphasis supplied)

Congress' intent was clear: it simply halted the process of the states taking jurisdiction without tribal consent, but stated clearly that the status quo was to be preserved.

Prior to passage of the Civil Rights Act of 1968, Congress was aware of Washington's jurisdictional scheme. Not only was Congress aware of tribal objections to partial jurisdiction, but Congress was also informed by the Yakimas' representatives that S. 966

[A]The appellee Yakima tribe was also represented at the 1965 hearings on the predecessor bill to PL 280, S. 966. (Hearings before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 89th Cong., 1st Sess., hereafter, 1965 hearings.)

did not correct these perceived abuses. 1965 hearings at 245, 253 and 254.

The Washington jurisdictional scheme was characterized in unflattering terms by the Yakima Tribal Council as an unworkable system of legal chaos. 1965 hearings at 243, 244. Members of the tribal council engaged in a specific discussion of Washington's partial jurisdiction scheme with Senator Ervin 1965 hearings at 253-255. There is no doubt that Congress was exposed to their objections. Nevertheless, it chose to save that jurisdictional scheme, rather than to void it.[B]

The congressional committee which reported S. 1843, which became the 1968 Indian Civil Rights Act, noted that it "repeals section 7 of Public Law 83-280 which grants civil and criminal jurisdiction to states, but will not affect any cession of jurisdiction to a state prior to its date of repeal." S. Rep. No. 841, 90th Cong., 1st Sess. at 16.[D]

Further evidence of Congress' intent to save Washington's jurisdictional scheme appears in the 1968 hearings on S. 1843, whose language ultimately became the language of PL 90-284, the 1968 Indian Civil Rights Act.

[B]Attorneys for the Makah Tribe also informed Congress that their jurisdictional problems with the State of Washington were not addressed by PL 280 since S. 966 did not affect prior assumptions of jurisdiction. Statement of Ziontz, Pirtle, Fulle in 1965 hearings at 356-358.

In 1968 a new set of hearings took place on a bill containing the same language as S. 966 with regard to prior cession of jurisdiction, Senate Bill 1843. S. 1843 was ultimately adopted and became part of the 1968 amendments to PL 280. 1968 hearings at 6-9.

[D]One sponsor of a bill with retrocession language identical to that of § 403(b) of the Indian Civil Rights Act of 1968, H.R. 15122, 90th Cong. 2d Sess., also observed that cessions of jurisdiction made to States prior to 1968 would be preserved. 1968 hearings at 32.

During the 1968 hearings, Arthur Lazarus, attorney for the Hualapai, Metlakatla, Nez Perce, Oglala, Sioux and other Indian tribes, appeared before the House Committee considering the 1968 amendments to PL 280 and submitted a written statement. 1968 hearings at 114. After reading that statement, Senator McClure of Idaho confronted Mr. Lazarus:

> "Mr. McClure: Mr. Lazaraus, on page 5 of your statement, at the bottom of the page you say, 'One of the major objections to Public Law 280 is its "all or nothing" approach.' I would assume from that if this were not clear or if this is to be modified, you would not have a major objection to Public Law 280.
> "Mr. Lazarus: There are two major objections to Public Law 280. One is the lack of consent and and the all or nothing approach as part of the lack of consent. A piecemeal approach implies negotiation back and forth between the Indians and the state authorities.
> "Senator McClure: I hate to cut you off but if I want to ask another question I am going to have to. And, I would like to refer you to page 4 of the Department of Interior's statement, a letter of March 27, 1968. They stated the second change is a change of form and not a change of substance because the present law permits the states to assume partial jurisdiction either by geographic area or by subject matter. Some of the states have in fact done so. For example, Nevada has assumed jurisdiction over limited areas. Idaho has assumed jurisdiction over limited subject matter. Does this reach a portion of your objection?
> "Mr. Lazarus: Yes, it does reach a portion of my objection, but it doesn't reach every state because the Department of Interior didn't mention all the states." 1968 hearings at 113-114.[c]

The validity of the State's jurisdiction is further buttressed by section 403(a) of Title IV of the Civil Rights Act. In subsection (a), the United States was authorized to

> " * * * accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section."

This text is noteworthy in two respects. First, Congress intended to preserve prior cessions of jurisdiction and leave retrocession to the states, without tribal consent; and secondly, that any state could return "all or any measure of" jurisdiction assumed under the 1953 act.

As one reviews the long legislative history of the 1968 Civil Rights Act, a striking parallel emerges. The debate which took place in the legislative hearings on the issue of partial assumption of jurisdiction by various western states had its counterpart in the debate between Judge Sneed and Judge Hufstedler, the authors of the majority and dissenting opinions, respectively, on this same issue. (See Juris. State., App. C) In his majority opinion, Judge Sneed emphasized the undesirable consequences which would flow from invalidating the *status quo*. In her

[c] As the letter from the Department of Interior to the House Committee reveals, see p....., *infra*, the letter from which Mr. McClure quotes also states: "Washington has assumed jurisdiction over both limited areas and limited subject matters."

dissent Judge Hufstedler disagreed sharply with Judge Sneed's appraisal of those consequences, and emphasized the undesirable consequences which would flow from preserving the *status quo.*

What both failed to notice was that Congress itself had resolved the debate—in favor of Judge Sneed. It deliberately preserved the *status quo.* And it did so after having had all of the policy issues laid before it.

By permitting such "partial" retrocessions Congress must have foreseen that certain states would choose varying systems of partial jurisdiction, including a system of so-called "checkerboarding" which the tribe asserts Congress *must have* so clearly meant to avoid in 1953. Thus, under the 1968 amendments, had Washington taken full jurisdiction, it could nevertheless have wound up, *with the blessing of Congress*, in exactly the same position it is in today under the 1963 act.

CONCLUSION

In summary, the State's jurisdictional system is valid in all respects. It is founded upon an undeniably rational basis and fully provides for the equal protection of the laws to all of the state's citizens. It was adopted in full compliance with the statutory requirements which Congress incorporated into Public Law 280. Furthermore, if any doubt existed regarding Public Law 280's authorization of the assumption of partial geographic and subject matter jurisdiction, all such doubt was resolved in the State's

favor by Congress in enacting the Indian Civil Rights Act of 1968, and therein ratifying the State's previous assumption of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 1978, three copies of the Brief of Appellants were mailed, postage paid, to James B. Hovis, Attorney at Law, 316 North Third Street, Yakima, Washington, 98907, counsel for appellee. I further certify that all parties required to be served have been served.

MALACHY R. MURPHY,
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Temple of Justice
Olympia, Washington 98504

APPENDIX A

April 17, 1963

Dear Senator Jackson:

Your Committee has requested a report on S. 143, a bill "To authorize assumption by the various States of civil and criminal jurisdiction over cases arising on Indian reservations with the consent of the tribe involved; to permit gradual transfer of such jurisdiction to the States; and for other purposes."

We recommend that the bill be enacted with the amendments suggested below.

Sections 6 and 7 of P. L. 280, 83rd Congress, permit any State, by its own legislative action and by amending its constitution if necessary, to assume jurisdiction "with respect to criminal offenses or civil causes of action, or with respect to both" in the areas of Indian country within the State "at such time and in such manner as the people of the State" wish. The bill amends sections 6 and 7 in the following respects:

1. A State may assume criminal or civil jurisdiction only with the consent of the tribe occupying the particular Indian country involved.
2. A State may, by agreement with the tribe, assume criminal or civil jurisdiction with respect to a designated geographical area of Indian country, or with respect to designated subjects such as marriage and divorce, juvenile offenses, commitments to State institutions, etc. The State need not assume full jurisdiction. We do not regard this as a change in the law. It merely makes explicit a conclusion which we think is implicit from the present language of P. L. 280.

3. The jurisdiction assumed by a State may be retracted by agreement between the State and the tribe.

Our files show that many Indian tribes and associations of friends of Indians opposed P. L. 280 because sections of 6 and 7 permitted the assumption of State jurisdiction without Indian consent. Many tribes have had a fear of State jurisdiction because they thought it meant the extension of all State laws, and the Indians did not understand what complete State jurisdiction would mean. Many tribal groups have indicated informally that they would be agreeable to having the State assume jurisdiction in certain specified areas, such as protective services for dependent or delinquent children. We believe that a piecemeal extension of State jurisdiction on a subject-matter basis, as specified in the bill, would allay the fears, real and imagined, of the Indian people by making it possible for them to understand exactly which State laws would be extended and permit them to have a voice in such extension. We believe that this would enable more progress to be made toward the extension of State jurisdiction in the Indian country.

The Task Force appointed by the Secretary to study the organization and programs of the Bureau of Indian affairs recommended legislation along the lines proposed here.

We recommend the following amendments to the bill:

1. On page 2, line 5, after "concerned" insert a coma and add "with the approval of the Secre-

tary of the Interior,". We believe that the Federal Government should be a necessary party to the agreement between a State and the tribe. The Federal Government has a direct interest in the subject matter.

2. On page 2, line 7, after "tribe" insert a coma and add "with the approval of the Secretary of the Interior,". The reason is the same as above.
3. On page 2, lines 8 and 9, delete "Except to the extent provided for by such consent and agreement," and substitute "The jurisdiction assumed by a State pursuant to this section shall be exclusive; with respect to any jurisdiction not assumed by a State".

The purpose of the change is to remove an ambiguity. We believe that to the extent a State assumes jurisdiction its jurisdiction should be exclusive rather than concurrent, and that with respect to any jurisdiction not assumed by the State the tribal and Federal jurisdiction should continue unimpaired. The present language of the bill is susceptible to this interpretation, but it is also susceptible to a different interpretation, which is that by agreement a State could assume concurrent jurisdiction with the tribe and the Federal Government. We believe that the latter procedure would be unwise.

4. On page 2, line 13, add a new sentence as follows: "The jurisdiction assumed by a State pursuant to this section shall be subject to the limitations specified in 18 U.S.C. 1162(b) and in 28 U.S.C. 1360(b)." These limitations apply to the States that were granted jurisdiction by name in P. L. 280 (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin), and they should apply equally to States that assume jurisdiction under this bill. The limitations relate to treaty rights,

and to the alienation, taxation, and probate of trust and restricted property.

Your attention is directed to the fact that the bill is silent with respect to the method of obtaining tribal consent and for establishing its existence. While this subject might be included in this bill, we do not regard it as essential.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

(Signed by John A. Carver, Jr.)
Assistant Secretary of the Interior

Hon. Henry M. Jackson
Chairman, Committee on
Interior and Insular Affairs
United States Senate
Washington 25, D.C.

APPENDIX B

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 27, 1968

Hon. WAYNE N. ASPINALL,
Chairman, Committee on Interior and Insular Affairs
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Your Committee has requested this Department's report on two identical bills, S. 1843 which passed the Senate in December of last year and H.R. 15122, and on a similar bill, H.R. 15419.

President Johnson, in his recent message "The Forgotten American," said:

"A new Indian Rights Bill is pending in the Congress. It would protect the individual rights of Indians in such matters as freedom of speech and religion, unreasonable search and seizure, a speedy and fair trial, and the right to habeas corpus. The Senate passed an Indian Bill of Rights last year. *I urge the Congress to complete action on that Bill of Rights in the current session.*"

We recommend the enactment of S. 1843. We note that the provisions of this bill have also been incorporated into H.R. 2516 by the Senate.

Title I, which is modeled after the Bill of Rights in the United States Constitution, is in the form recommended by the Department in its report to the Senate Judiciary Committee in the 89th Congress.

Some of the constitutional provisions which pro-

tect rights and freedoms of citizens from arbitrary action by the Federal Government have been held by the courts to be inapplicable with respect to Indian tribal governments in actions which affect their tribal members. The principal decisions involve the first amendment to the Constitution, and concern religious freedom. In the cases of *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D. N.M. 1954), and *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), the courts held that the guaranty of religious freedom does not restrain local tribal governments from actions that interfere with the freedom of religious choice of their members.

Such absence of restraint on tribal governments flows from a time when Indian tribal governments were regarded as sovereign nations; when Indians were not even counted in the enumeration upon which congressional apportionment was based: and when much of what is now Indian country was unexplored wilderness. Through the 19th century the rights of citizenship were progressively applied: many Indian individuals and groups of individuals were made citizens by special Acts; and finally in 1924, by Act of Congress, all Indians not already made citizens became citizens of the United States and the States in which they resided.

Since 1924 Indian citizenship and tribal freedom from constitutional restraint have been incompatible.

Many tribes have adopted constitutions which contain provisions affording constitutional protec-

tion to their members. For example, the constitution of the Rosebud Sioux Tribe provides that its governing body shall have certain enumerated powers "subject to any limitations imposed by statute or the Constitution of the United States." There has been no judicial decision, however, holding that language is enforceable in the Federal courts.

Title I extends to the American Indian in his dealings with the Indian tribal governments basic rights and freedoms enjoyed by other citizens of the United States. These rights are specifically enumerated in the bill.

Title II directs the Secretary of the Interior to prepare and recommend to the Congress by July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations.

The Department now has a code, which is an operating code, rather than a model one. It is published in 25 C.F.R. 11. It applies only to tribes that have not adopted codes of their own, and only four tribes now use it. Two of those four are in the process of adopting their own codes. For its present use the code has been adequate. The Senate Committee's report on this portion of the bill states:

"The procedures in title 25 are outmoded, impractical, and fail to provide for an adequate administration of justice on Indian reservations. For example, under the existing code, the total number of challenges in selecting a jury, preemptory and challenges for cause, is three. Subpoenaed witnesses are paid by the

party calling them their actual traveling and living expenses incurred, if the court so direct, and the fee for jury duty remains at 50 cents a day. Questions before the court regarding the meaning of laws, treaties, or regulations are frequently referred to the superintendent for his opinion even though he is not a lawyer and lacks legal training.

"A new model code is necessary if there is to be a sensitivity to our traditional and constitutional standards in Indian courts. A code applied uniformly to all Indian courts would also assure individuals subject to their jurisdiction the same rights, privileges, and immunities under the U.S. Constitution as are guaranteed other citizens of the United States being tried in a Federal court for similar offenses."

While we might differ on the question of whether the present "operating" code is "outmoded", etc., we would agree that probably it could be improved and updated.

We now encourage each tribe to adopt a code that conforms as much as possible to the law of the State involved. Our goal is to make the Indians a part of the States in which they reside. A model code could be drafted in a manner that is consistent with that effort.

We note also that the bill calls for the development of a "model code," but it does not require the tribes to adopt all or any part of it. We believe that this is wise.

Title III, which relates to State assumption of civil or criminal jurisdiction over Indian reserva-

tions, changes the present law now embodied in section 7 of Public Law 280, 83rd Congress:

(*a*) by requiring consent of the tribe occupying the reservation before a State may assume jurisdiction;

(*b*) by making explicit an authority which we believe is now implicit—an authority to assume partial jurisdiction, or piecemeal jurisdiction, either by geographical area or by subject matter; and

(*c*) by authorizing the United States to accept a retrocession of jurisdiction from any State that acquired jurisdiction under the present provisions of Public Law 280.

The first of these changes is highly desirable. Our files are replete with resolutions and communications from many Indian groups urging this change. The change would do much to allay the fears, whether real or imagined, of the Indian people that they may be subjected to strange courts before they are ready, or before they are assured of fair and impartial treatment.

The second change is a change of form and not a change of substance, because the present law permits the States to assume partial jurisdiction either by geographic area or by subject matter. Some of the States have in fact done so. For example, Nevada has assumed jurisdiction over limited areas, Idaho has assumed jurisdiction over limited subject matter (compulsory schools, public assistance, domestic relations, mental illness, juvenile delinquency, dependent children. Washington has assumed jurisdiction over both limited areas and limited subject matter.

Inasmuch as this part of title III is a clarification rather than a change of present law, we have no objection to it.

The third change gives the United States permissive authority to accept a retrocession of jurisdiction. It does not specify the official who may exercise the permissive authority on behalf of the United States. Persumably, it would be the Secretary of the Interior.

Title IV creates a new crime of "assault resulting in serious bodily injury" within the Indian country. While we believe that the enactment of Public Laws 89-707. 80 Stat. 1100, 18 U.S.C. 1153, 3242, makes unnecessary any further legislation relating to assault within the Indian country, we do not object to this additional crime The law now covers assault with a dangerous weapon, assault with intent to commit rape, and assault with intent to kill.

Title V provides that any application for a contract or agreement relating to the employment of legal counsel requiring approval of the Secretary of the Interior or the Commissioner of Indian Affairs will automatically be in full force and effect if approval is neither granted nor denied within a period of 90 days after application for approval is filed with the Secretary.

On November 26, 1962, the Commissioner of Indian Affairs delegated authority to the Area Directors to approve tribal attorney contracts. Prompt action is now taken on proposed contracts or agreements for the employment of legal counsel by Indian tribes. When there is a delay in the approval of a con-

tract or agreement for the employment of legal counsel, it is for the purpose of an investigation pertinent to the contract or agreement, which is necessary to protect the interests of the Indians.

Practically all contracts require some changes to conform them to statutes and policies. At the present time the Area Director as his representative negotiates the necessary changes with the attorney, after which there is prompt approval. In some cases a contract is approved subject to agreement of the parties to a specified change. This procedure makes it possible for the contract to have an earlier effective date drafted, executed, and resubmitted for approval. It would be a disservice to the tribes to preclude the use of this procedure.

We believe that the present procedure is working satisfactorily, and that this title is not needed; however, we do not view it as significantly changing our present practices or procedures. We believe that we can act within the prescribed time.

Title VI directs the Secretary of the Interior to revise and extend volumes 1 and 2 of Kappler, "Indian Affairs, Laws and Treaties". The revision is to include all treaties, laws, Executive orders, and regulations relating to Indian affairs in force on September 1, 1967. The revison must be kept up to date on an annual basis.

We believe these proposals to be desirable and are prepared to carry them out.

The Bureau of the Budget has advised that the

enactment of S.1843 in its present form is in accord with the President's program.

Sincerely yours,

HARRY R. ANDERSON,
Assistant Secretary of the Interior.